Nos. 79-356 and 79-5304

In the Supreme Court of the United States

OCTOBER TERM, 1979

HAROLD ERICKSON, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 601 F. 2d 296.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1979. On August 3, 1979, the court of appeals denied a petition for rehearing in No. 79-356 and a

motion to extend the time to petition for rehearing in No. 79-5304. The petitions for a writ of certiorari were filed on September 4, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioners' conspiracy convictions must be reversed because the court of appeals found the evidence insufficient to support their convictions for one of the two substantive offenses alleged to be the objects of the conspiracy.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Wisconsin, petitioners were convicted on six counts of making false entries in the records of the bank of which they were officers, in violation of 18 U.S.C. 1005 (Counts III through VIII), on one count of filing false and misleading financial statements with the Securities and Exchange Commission, in violation of 15 U.S.C. 78m(a) and 78ff (Count II), and on one count of conspiring to commit those offenses, in violation of 18 U.S.C. 371 (Count I). Petitioners were both sentenced to concurrent terms of six months' imprisonment on each count.

The evidence at trial showed that petitioner Erickson was the chairman of the board of directors of American Bankshares Corporation, a holding company, and its bank subsidiary, American City Bank and Trust Company. He and petitioner Wilson also served as officers of the bank (Pet. App. 2). In early 1973 the bank expected to suffer losses of approximately $800,000 as a result of securities transactions effected by petitioner Wilson (Pet. App. 2-3). In order to conceal these losses in the bank's financial reports, petitioners engaged in a series of

negotiated "overtrades," whereby the bank sold selected securities at inflated prices instead of prevailing market prices (Pet. App. 3). The *quid pro quo* for each of these sales was a concurrent agreement by the bank to subsequently buy from the purchaser other securities of equal value at equally inflated prices (*ibid.*).

The manner in which these transactions were reported formed the basis for the indictment. The bank recorded these transactions as if the purchases were unrelated to the sales and each side of the transaction had been an independent arms-length sale and purchase (*ibid.*). The premium received by the bank on the sale of securities was included in the reported sale price, without disclosure of the agreement to pay a similar premium on the reciprocal purchase of other securities (Pet. App. 4). Similarly, the securities purchased by the bank were recorded at the inflated purchase price instead of their true market value (*ibid.*). In the Form 10-K report filed with the Securities and Exchange Commission for 1973, petitioners understated the bank's losses by more than $400,000 (Pet. App. 6, 9).

The court of appeals reversed petitioners' convictions for making false entries in banking records as charged in Counts III through VIII of the indictment. The court concluded that the evidence was insufficient under those counts because the bank records introduced at trial did not purport to show the market value of the securities, but rather showed only the actual price at which the transactions took place. Although the court acknowledged that entries which inaccurately record transactions or which record fictitious transactions can violate 18 U.S.C. 1005, it held that entries reflecting transactions on the bank's books exactly as they occurred cannot be false entries under the statute even though they are part of a fraudulent scheme (Pet. App. 10-11).

The court of appeals affirmed petitioners' convictions for filing a false Form 10-K as charged in Count II of the indictment. The court also affirmed petitioners' conviction for conspiracy under Count I of the indictment, which charged as objects of the conspiracy both the filing of the false Form 10-K and the making of false entries in the records of the bank (Pet. App. 7-14).

ARGUMENT

Petitioners contend (79-356 Pet. 8-26; 79-5304 Pet. 4-7) that their convictions on the conspiracy count (Count I) are invalid because the court of appeals reversed their convictions for one of the two types of substantive offenses alleged to be the objects of the conspiracy.

This claim is without merit under the circumstances of this case. The substantive offenses charged in the indictment all arose from a single series of securities transactions, the records of which were used to prepare both the entries in the bank's records and the Form 10-K (Pet. App. 2-6). The evidence showed a single scheme to avoid reporting the bank's losses, and there was no evidence from which the jury could rationally have concluded that petitioners' conspiratorial agreement extended to one of these objects but not the other. Under the circumstances, the court of appeals correctly determined that the conspiracy conviction rested on a valid basis (Pet. App. 11):

> Because we know from the jury's verdict on Count 2 that the [conspiracy] verdict on Count 1 did not rest solely on a determination that the defendants conspired to commit the offenses charged in Counts 3 through 8, reversal of convictions on the latter counts does not require reversal on Count 1.

Since the conspiracy had an unlawful substantive objective apart from the offenses charged in Counts III

through VIII, the court of appeals was correct in upholding petitioners' conspiracy conviction. See *United States* v. *Wedelstedt*, 589 F. 2d 339, 341-342 (8th Cir. 1978) (collecting cases); *United States* v. *Dixon*, 535 F. 2d 1388, 1401-1402 (2d Cir. 1976); *United States* v. *James*, 528 F. 2d 999, 1014 (5th Cir.), cert. denied, 429 U.S. 959 (1976); *United States* v. *Papadakis*, 510 F. 2d 287, 297 (2d Cir.), cert. denied, 421 U.S. 950 (1975); *United States* v. *Tanner*, 471 F. 2d 128, 140 (7th Cir.), cert. denied, 409 U.S. 949 (1972); *Moss* v. *United States*, 132 F. 2d 875, 878 (6th Cir. 1943). See also *Turner* v. *United States*, 396 U.S. 398, 420 (1970).

Although several courts of appeals have reversed multiple objective conspiracy convictions when reversing convictions for one or more substantive offenses alleged to be objects of the conspiracy (*United States* v. *Carman*, 577 F. 2d 556, 566-568 (9th Cir. 1978); *United States* v. *Tarnopol*, 561 F. 2d 466, 475 (3d Cir. 1977); *United States* v. *Baranski*, 484 F. 2d 556, 560-561 (7th Cir. 1973)), none of the cases relied upon by petitioners conflicts with the result reached by the court below.[1] In *Tarnopol* and *Baranski*, all of the substantive charges in the indictment were either rejected by a jury verdict of acquittal or were found to be invalid on appeal. Here, by contrast, the jury's conviction of both petitioners on one substantive count, affirmed by the court of appeals, demonstrated that the jury did find that petitioners had conspired to commit at least one federal offense. Nor is the Ninth Circuit's decision in *United States* v. *Carman*, *supra*, in conflict with the decision below. In *Carman*, the court of appeals recognized that a "conspiracy conviction is immune from

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[1] Any difference between the Seventh Circuit's decision in this case and its prior opinion in *Baranski* would reflect at most an intra-circuit disagreement not warranting review by this Court. *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

attack on appeal *so long as no substantive count conviction is overturned because the count failed to state a crime.*" 577 F. 2d at 567 (emphasis in original); see also *id.* at 568.[2] In this case, unlike *Carman*, the court of appeals based its reversal of the substantive convictions on the insufficiency of the evidence proffered by the government to prove Counts III through VIII, not on a failure of the indictment to state an offense (Pet. App. 9-11).[3]

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[2]The court in *Carman* also explained that if the jury "focused" on "other crimes" as well as the crimes that form the basis for substantive convictions that are reversed on appeal, "the conspiracy conviction should be sustained." *Ibid.* Here, the jury's conviction of both petitioners under Count II of the indictment, based on their scheme to conceal financial losses, establishes that the jury "focused" on "other crimes" adequately proved by the government.

[3]Petitioners' reliance on *Stromberg* v. *California*, 283 U.S. 353 (1931), is equally misplaced. *Stromberg* dealt with a conviction on a single substantive count, which, under the instructions to the jury, may have rested on any of three separate theories, one of which was inconsistent with the Constitution. This Court reversed the conviction because it was impossible to determine from the general verdict whether the conviction had a permissible basis. This case, unlike *Stromberg*, involves convictions on a conspiracy count and a valid substantive count alleged as an object of the conspiracy and presents no issue of a conviction resting on an unconstitutional theory.

The case that comes closest to conflicting with the decision of the court of appeals in this case is *United States* v. *Dansker*, 537 F. 2d 40, 51 (3d Cir. 1976), cert. denied, 429 U.S. 1038 (1977). In *Dansker*, the defendants were convicted under a three count indictment alleging conspiracy to commit bribery and bribery of two persons. The court of appeals vacated one of the substantive bribery convictions and held that, in the circumstances there involved, the conspiracy conviction must also be vacated. The question in *Dansker* was the essentially factual question whether the jury might logically have found (537 F. 2d at 51) a conspiracy only as to the invalidated substantive charge. The court concluded that the jury could have done so in that case, involving two separate bribees. It is not clear that the *Dansker* court would reach the same result in the different factual situation presented here. In the present case, there is no realistic possibility that the jury could have convicted petitioners

In any event, even if the issue presented by petitioners were otherwise deemed appropriate for review by this Court, review is not necessary in this case. Petitioners each received a sentence on the conspiracy count (Count I) equal to and concurrent with the sentence imposed on the remaining substantive count (Count II).[4] There is therefore no need for this Court to review petitioners' challenge to the conspiracy conviction. See *Barnes* v. *United States*, 412 U.S. 837, 848 n.16 (1973); *Andresen* v. *Maryland*, 427 U.S. 463, 469 n.4 (1976). Even assuming

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solely for engaging in a conspiracy to make false bank entries, and not for conspiracy to file a false Form 10-K. The bank entries and the Form 10-K reflected a single series of securities transactions and were prepared pursuant to a single scheme intended to conceal the losses resulting from those transactions, a scheme in which both petitioners were participants as confirmed by their substantive convictions under Count II of the indictment (see Pet. App.12). See *United States* v. *Dixon*, *supra*, 536 F. 2d at 1401-1402.

[4]Petitioners argue (79-356 Pet. 26-27; 79-5304 Pet. 7-8) that their convictions under Count II should be reversed because evidence was introduced at trial relating to the invalidated convictions under Counts III-VIII. However, they have made no showing of any kind that evidence regarding the entries in the bank records could have prejudiced the jury's evaluation of the evidence regarding the false Form 10-K. Nor have they challenged the sufficiency of the evidence showing that they caused a false Form 10-K to be filed. Moreover, given the close relationship between the Form 10-K and the bank records, and the scope of evidence relevant to prove the conspiracy to file a false Form 10-K, proof of the bank entries would have been admissible even if the indictment had been limited to the offenses charged in Counts I and II. *United States* v. *Wedelstedt*, *supra*, 589 F. 2d at 341, and *United States* v. *Papadakis*, *supra*, 510 F. 2d at 297, lend no support to petitioners' claims. Although noting that an overwhelming amount of evidence relevant only to the invalid portion of a conspiracy charge might be prejudicial and require reversal of a conspiracy conviction, both courts adopted the general rule that a conspiracy conviction will be upheld so long as the evidence shows that the defendant agreed to accomplish one of the criminal objectives.

that petitioners' convictions for conspiracy were reversed, such action would not affect their sentence, would not avert any collateral consequences, and would not affect the time that they must serve before release on parole under the guidelines of the United States Parole Commission (28 C.F. R. 2.20). Compare *Rubin* v. *United States*, 439 U.S. 810 (1978).

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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